IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 128.

PACIFIC MAIL STEAMSHIP COMPANY
PETITIONER,

vs.

ED. SCHMIDT, RESPONDENT.

Reply Brief of Respondent.

JAMES W. RYAN,
Proctor and Advocate for Respondent.

JOHN L. McNAB,
Of Counsel.

[illegible] PRINTING COMPANY, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 323.

PACIFIC MAIL STEAMSHIP COMPANY,
PETITIONER,

vs.

ED. SCHMIDT, RESPONDENT.

REPLY BRIEF OF RESPONDENT.

1. The respondent rendered the services sued upon as a seaman, and the voyage had not ended as to him.

The petitioner has not attempted to distinguish—nor has it even mentioned—in its reply brief any of the cases relied upon by the respondent in support of the above proposition (Respondent's Brief, pp. 2-3). Those cases are on all fours with the case at bar. The opinion in the first case (Re The Great Eastern S. S. Co., 53 L. T. 594), particularly, considered almost every question which has been raised in this case and decided it adversely to the steamship company. The provisions of the Revised Statutes regarding seamen were taken almost verbatim from the English Merchant Shipping Act of 1854, and there is a corresponding section of the Revised Statutes for every provision of the Merchant Shipping Act referred to in the opinions in those cases.

2. It is not necessary that a seaman be under shipping articles in order to recover continuing wages under the provisions of section 4529, R. S.

It was held in Re The Great Eastern S. S. Co., *supra*, that, since shipping articles are required solely for the protection of the seaman (The Seamen's Act of the United States of 1872 is entitled "An Act . . . for the further protection of American seamen"), their absence does not prevent him from recovering continuing wages as damages under the section of the Merchant Shipping Act corresponding to section 4529, R. S., if his actually earned wages have not been paid him promptly upon his discharge.

But even if shipping articles were required:

3. There is no evidence whatever in this case that the respondent has ever been discharged from the shipping articles entered into between him and the master of the vessel in this case on July 24, 1913; and the libel is for wages earned on board the vessel during part of the voyage covered by those shipping articles.

The petitioner in its supplemental brief, at page 10, admits "the fact that this record does not show that all the provisions of sections 4549 to 4553, Revised Statutes, were complied with in discharging the libelant," but it does not specify any one of those provisions with which it did comply. The Revised Statutes provide that the discharge of a seaman from shipping articles shall be effected if (1) "The master or owner and each seaman, respectively, in the presence of the shipping commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping commissioner shall also sign and attest it (section 4552, R. S.);" and (2) "Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of discharge (section 4551, R. S.)." There is no evidence whatever in this case of either (1) a mutual release or (2) a certificate of

discharge, and as a "discharge" is a mere conclusion of law derived from those facts, there is consequently no evidence of a discharge.

It is very evident that when the seaman testified in this case that he had been "paid off" by the shipping commissioner he merely meant that he had been paid his wages up to date (the voyage not having ended at that date—see Respondent's Brief, p. 5), because the seaman testified that he received his wages from the shipping commissioner (Tr. Rec., p. 16) "during the noon hour" on September 24, 1913; that such receipt of wages was not considered as a termination of his employment (Tr. Rec., pp. 16, 17, 18); that he remained on board the vessel because "I was still chief steward and not notified I had been discharged for anything" (Tr. Rec., p. 12); that "if they (the seamen) are not notified" "by a letter from the Flood Building, from the (petitioner's) office," "they still keep on in the same position," (Tr. Rec., p. 18); and that there was no actual termination of his employment under the shipping articles until five o'clock P. M. on October 1, 1913, at which time the port steward of petitioner notified him orally that he was discharged (Tr. Rec., p. 16), and on the following morning the respondent received a letter, addressed to him as chief steward, from the office of the petitioner, notifying him of his discharge (Tr. Rec., p. 16).

4. Furthermore, the shipping commissioner would have had no power to discharge respondent from the shipping articles on September 24, 1913, because there was no actual termination of respondent's employment by petitioner on that date.

The Seamen's Act of July 20, 1790, provided that a written agreement should be entered into between the master and crew of every vessel bound on a foreign voyage. The Revised Statutes of 1872 provided that each

United States Circuit Court should appoint a shipping commissioner, who was merely to act as a court commissioner in witnessing the execution and discharge of those written agreements. The discharge was to be effected by the master notifying the seaman, in the presence of the shipping commissioner, that his employment for that voyage was terminated. No such notification was given in the case at bar, and the undisputed evidence is that no termination of employment for that voyage was intended, because the respondent's duties with reference to that voyage had not been fully performed on September 24, 1913 (See Respondent's Brief, p. 5), and the services that the respondent actually rendered from September 24, 1913, to October 1, 1913, were in furtherance of that voyage from Balboa to San Francisco.

Therefore the shipping commissioner would not have had power to permit the master and seaman to terminate the shipping articles but not terminate the contract of employment for that voyage, which the statute expressly provided should be evidenced by shipping articles throughout its entire duration.

The universally recognized rule for ascertaining when shipping articles have terminated is expressed in section 55 of the German Regulation for Seamen of 1872 (Wendt's Maritime Legislation, 3rd Ed., pp. 799-800), which provides that: "after the voyage is ended the seaman can not demand his dismissal *before the cargo is discharged, the vessel cleaned* and properly secured in port, or at any other place, and, if required, the protest extended."

5. The vessel in the case at bar was on a foreign voyage:

(a) **The Commissioner of Navigation has decided that the voyage during which the services sued upon were rendered was a FOREIGN voyage, because he collected a**

tonnage tax of $36.30 from her on her return to San Francisco from that voyage. See copy (certified by the Commissioner of Navigation), on file with the Clerk of this Court, of the public records in the office of the Bureau of Navigation showing that such tonnage tax was collected on this particular voyage.

Such tonnage tax is collected only from vessels arriving from foreign ports. Sec. 36, Act of August 15, 1909; Navigation Laws, U. S., 1915, p. 171.

Petitioner in its reply brief (p. 3) stated: "We are informed by the Commissioner of Navigation that no tonnage tax is exacted of vessels entering the United States from the Canal Zone, such zone not being regarded as a 'foreign port or place.'" **The obvious answer to that is the above copy of the Commissioner of Navigation's records, certified by the commissioner himself.**

But it is idle and beside the point to argue as if this vessel were bound only to Ancon, Canal Zone, because she was bound to "any part of the world," and the above record of the Commissioner of Navigation shows that she touched at foreign ports.

(b) **The decision of the Commissioner of Navigation that the vessel in the case at bar was on a foreign voyage and therefore subject to a tonnage tax is final and binding on this court, because "on all questions of interpretation . . . relating to the collection of tonnage tax . . . his (the Commissioner of Navigation's) decision shall be final" (Sec. 3, Act July 5, 1884) Navigation Laws U. S. 1915, p. 174). A court should not attack that decision of the Commissioner of Navigation by a merely collateral inquiry in a suit for seaman's wages.**

(c) Moreover, the petitioner admits in its reply brief, at page 2, that the shipping articles in this case were "adapted to *foreign* voyages."

In the case (The City of Montgomery, 210 Fed. 673),

relied upon by the petitioner, the voyage was limited to any ports *coastwise*. The word "coastwise" is a technical term under the Navigations Laws of the United States, meaning "to any port of the United States."

(**d**) **This court has decided that the Canal Zone is a foreign country within the meaning of the Customs Laws.** David Kaufman & Sons Co. *vs* Smith, 216 U. S., 610. As the principal purpose of navigation is the transportation of goods, if the transportation of those goods be to a foreign country, certainly the vessel transporting those goods is also bound to a foreign country.

(*e*) The city of Ancon has as its port "the harbor adjacent to the city of Panama," which was expressly reserved by the Republic of Panama from its grant to the United States. Re Ocean Mail Service, 29 Opns. Atty. Gen., 194.

(*f*) Congress has specifically provided that a vessel that is *merely* bound from a port of the United States on the Atlantic Ocean to a port of the United States on the Pacific Ocean, or vice versa, via the Panama Canal, and thus passing **through** the Canal Zone, is on a coastwise or domestic voyage; but a vessel that is bound to the Canal Zone *as a port of discharge or receipt of cargo* is bound to a foreign country.

6. Petitioner withheld respondent's wages without any reasonable ground for dispute.

Section 4550, R. S., provides that "not less than forty-eight hours before paying off or discharging any seaman" every master shall deliver to the shipping commissioner a full account of the seaman's wages "and all deductions to be made therefrom on any account whatsoever; and in default shall, for each offense, be liable to a penalty of not more than fifty dollars. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed, unless it is included in the account delivered."

The deduction which petitioner has set up as a defense in the case at bar was not included in any account delivered to the shipping commissioner.

7. Regarding the statement of the petitioner in its reply brief at page five. In the case of Hemmenway *vs.* Fisher, 20 How., 255, Chief Justice Taney, delivering the opinion of the Court, held, in language which is so clear as not to admit of misapprehension, that in suits in admiralty not merely the question of whether or not interest should be awarded, but what the rate of that interest should be, is discretionary with the appellate court.

8. Counsel for petitioner have not even attempted to answer the argument of respondent on page eight of his brief, that the Circuit Court of Appeals for the Ninth Circuit had been empowered by Congress to adopt its Rule 30 (Subd. 4) providing for the allowance of "*damages* and interest" at its discretion on appeals in admiralty.

9. Since there has been no conflicting decision of any court rendered since the Circuit Courts of Appeals were created, this court should not overrule fourteen decisions of the Circuit Courts of Appeals of the four great Admiralty Circuits on a question the determination of which by them has been declared by Congress to be "final."

The Circuit Courts of Appeals have decided fourteen times, without a dissenting opinion in any of the cases, the exact point that "an appeal in admiralty from a District Court to the Circuit Court of Appeals opens the whole case for trial *de novo* in the appellate court subject to its rules, and the fact that one party did not appeal does not preclude the court from directing the entry by the District Court of a decree more favorable to him" on a question of fact. See Respondent's Brief, pp. 11, 12, and 13.

Counsel for petitioner have not attempted in their brief to distinguish any of those cases from the case at bar. All the cases cited and quoted from by petitioner on this point in its reply brief (p. 6) were expressly held in the case of Munson *vs.* Miramar S. S. Co., 167 Fed., 960, (C. C. A., 2nd Ct.), to have been overruled by the case of Irvine *vs.* The Hesper, 122 U. S., 256, which was itself decided before the Circuit Courts of Appeals had been created.

The purpose of the exercise by this Court of its power on *certiorari* to the United States Circuit Courts of Appeals is to reconcile conflicting decisions, but where there are no conflicting decisions, and where counsel for petitioner have not cited any decision by any court rendered since the Circuit Courts of Appeals were created, it will not on *certiorari* overrule the unanimous decisions of all the Circuit Courts of Appeals of the great Admiralty Circuits.

Respectfully submitted,

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JOHN L. McNAB,
Of Counsel.

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No. 323

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

PACIFIC MAIL STEAMSHIP COMPANY,

Petitioner,

vs.

ED SCHMIDT,

Respondent.

BRIEF OF RESPONDENT.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Petitioner,

vs.

ED SCHMIDT,

Respondent.

BRIEF OF RESPONDENT

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE.

This is an admiralty suit *in personam* for seaman's wages accruing under the provisions of Section 4529 of the Revised Statutes of the United States.

The case is stated in Schmidt vs. Pacific Mail S. S. Co., 209 Fed. 264, and in Pacific Mail Steamship Co. vs. Schmidt, 214 Fed. 513.

ARGUMENT.

The elements of a cause of action under the provisions of Section 4529, R. S., are: (1) The rendition of services as a seaman on board an American vessel bound on a foreign voyage; and (2) the refusal or neglect of the owner or master, without sufficient cause, to pay the seaman the wages earned for such services when payment is due, and the continuance of such refusal or neglect for at least one day.

I. The respondent rendered the services sued upon as a seaman on board an American vessel bound on a foreign voyage.

(a) THE RESPONDENT RENDERED SERVICES AS A SEAMAN.

(1) Section 4612, R. S., provides that: "Every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same [an American vessel] shall be deemed and taken to be a 'seaman'."

(The definition of a "seaman" contained in the English Merchant Shipping Acts is identical, so far as the respondent is concerned, with the definition contained in Section 4612, R. S. Therefore the English and Scottish decisions hereinafter referred to are directly applicable to the case at bar.)

Re The Great Eastern S. S. Co.; Claims of Williams and others, 5 Asp. M. C., N. S., 511, 513; 53 L. T. 594;

Thomson vs. Hart, 28 Scot. L. R. 28; 18 Ct. of Sess. Cas. (4th ses.), Just. Cas. 3;

Reg. vs. Lynch & Jones, 8 Asp. Rep. M. C., N. S., 363; 67 L. J. Q. B. 59; (1898) 1 Q. B. 61; 77 L. T. 568; 46 W. R. 205; (Opinion delivered by Lord Russell, C. J.);

The Chieftan, Br. & L. 104; 32 L. J., Adm. 106; 9 Jur. (N. S.) 388; 8 L. T. 120; 11 W. R. 537; (Opinion delivered by Dr. Lushington);

Queen vs. Judge etc. and Owners of S. S. Michigan, 25 L. R., Q. B. D., 339; (Opinions by Lord Coleridge, C. J., and Wills, J.).

See also the cases cited in the opinions delivered by the courts below in the case at bar.

(2) THE RESPONDENT WAS UNDER SHIPPING ARTICLES, BECAUSE THE ARTICLES IN THIS CASE WERE FOR A DEFINITE TIME (SIX MONTHS), AND WERE NOT FOR ONE VOYAGE OR A CERTAIN NUMBER OF VOYAGES.

(a) The statutes of the United States (Sec. 4511, R. S., and 23 Stats. 58, Sec. 8301, U. S. Comp. Stats. 1913) authorize only two kinds of engagements, either of which the master may enter into with a seaman: (1) for one voyage or a certain number of voyages; and (2) for a definite time. The shipping articles in the case at bar do not describe a

"trip" or "voyage," nor are the words trip or voyage used. The articles state that the vessel is bound to such "ports and places in any part of the world as the master may direct," and that in the course of its rambling it will touch at a particular port (Ancon). A vessel which is bound anywhere in the world cannot be said to be on a voyage, and consequently is a rambler or "tramp."

Since no voyage was described in the articles, the only alternative open to the master was to enter into an engagement with the seaman for a definite time. But instead of doing that the master so manipulated the language of the shipping articles that they would bind the seaman for a definite time—"for a term of time not exceeding six months"—but would not bind the master for any period whatever. Immediately after the vessel left the port of San Francisco the master could have terminated the service of respondent, without assigning any cause, by merely transferring him (Tr. Rec., p. 62, lines 14-18) "to any . . . vessel bound to San Francisco . . . any time during the period of time called for by these shipping articles."

Since the engagement was highly inequitable to the seaman, and purported to impose an unlawful restriction upon him, a court of admiralty will so construe the articles as to afford the greatest relief to the seaman. Therefore, in this case the articles should be regarded as having been entered

into for a definite time—six months—and consequently the services sued upon were clearly under the articles.

(b) THE SHIPPING ARTICLES WERE IN FORCE DURING THE ENTIRE TIME IN WHICH THE SERVICES SUED UPON WERE BEING RENDERED, AND THE "VOYAGE" HAD NOT ENDED AS TO RESPONDENT.

(1) It was part of respondent's duties under the shipping articles and during the "voyage" to (Tr. Rec., pp. 13, 15, 28) unload the soiled linen and deliver the empty wine bottles on the dock, "to put out the crockery, the glassware, the silver and the linen," and to clean the rooms occupied by the passengers. Those duties had not been completely performed at the time that respondent was discharged.

(3) THE VESSEL WAS BOUND TO A FOREIGN PORT:

(a) She was bound to such "ports and places in any part of the world as the master may direct," and was to touch at Ancon, Canal Zone.

(b) She was registered for the foreign trade, and has not at any time been licensed or enrolled under the coastwise shipping laws of the United States.

(1) Her original register for the foreign trade is a public record in the office of the Collector of Customs of the Port of New York, and a copy of that register is

a public record in the office of the Collector of Customs of the Port of San Francisco, California.

(c) Ancon, Canal Zone, is a foreign port.

(1) It is a port of the Republic of Panama.

(a) The United States has only a right of way over part of the territory of the Republic of Panama for the purpose of an interoceanic canal.

(1) Congress has not organized the Canal Zone into a territory for the purpose of enabling it to ultimately become a State of the Union, and therefore it is not "part of the United States." The Insular Cases—particularly Downes vs. Bidwell, 182 U. S. 244; and Dooley vs. U. S., 183 U. S. 151.

(2) Persons born within the Canal Zone are not citizens of the United States, nor has Congress extended the provisions of the Constitution to them.

II. The petitioner has not at any time denied that on October 1, 1913, it refused and neglected, and has continuously since that time refused and neglected ,to pay the respondent his wages.

Both the United States District Court and the United States Circuit Court of Appeals have held in this case that there was no reasonable ground for a dispute regarding the duty of the petitioner to pay the respondent the wages actually earned by him. A District Judge dissented from the opinion of the Circuit Court of Appeals because, admitting that there was no reasonable ground of dispute as to

the payment of the wages actually earned, he contended that there was a reasonable ground of dispute as to what the measure of damages should be for the continuing refusal to pay such wages. But obviously the "sufficient cause" (or reasonable ground of dispute) mentioned in Section 4529, R. S., refers ONLY TO THE WAGES ACTUALLY EARNED, and as there was clearly no reasonable ground for an appeal from a decree awarding such wages actually earned, the petitioner's so-called "right of appeal" was not to any extent abridged.

Moreover, on motion of the petitioner, the Circuit Court of Appeals entered an order that petitioner might pay the wages actually earned, plus the continuing wages which had accrued at the date of the order, into the registry of the court, and that thereupon the wages should cease continuing (Tr. Rec., p. 65; and respondent's brief on pet. for cert., p. 6). But the petitioner has continuously refused and neglected to make such payment. Therefore it has waived, because it has refused to assert, any right it might have to a discontinuance of the wages pending the appeal. The petitioner could have made the motion above mentioned, and have obtained an order of the kind referred to, in the District Court immediately after the filing of the libel, and thus have prevented the wages from continuing, but it did not do so.

III. The measure of damages decreed by the Circuit Court of Appeals in this case is that provided by Section 4529, R. S., for a continuous refusal, without reasonable ground of dispute, to pay a seaman wages which have been earned by him, to wit: "A SUM EQUAL TO ONE DAY'S PAY FOR EACH AND EVERY DAY DURING WHICH PAYMENT IS DELAYED BEYOND THE RESPECTIVE PERIODS."

(a) Victualling money is a part of wages. The Tergeste, 9 Asp. M. C., N. S., 356, 357; 72 L. J. P. 18 (1903) p. 26; 87 L. T. 567.

The Circuit Court of Appeals was bound to give effect to the plain provisions of the statute, and had power to do so; either because:

(1) UNDER ITS RULES THE CIRCUIT COURT OF APPEALS HAD POWER TO AWARD INTEREST ON THE SUM DECREED BY THE DISTRICT COURT TO BE DUE AT A RATE WHICH WOULD CAUSE THE INTEREST TO BECOME EQUAL TO THE MEASURE OF DAMAGES PROVIDED BY SECTION 4529, R. S.

Rule 30, sub. 4, Rules, U. S. Cir. Ct. of Appeals for the Ninth Circuit (and also the same number and subdivision of the rules of all the other Circuits); Dewhurst's Rules of Practice, U. S. Courts, p. 264.

The rule provides for "damages and interest" (in the nature of damages for delaying execution on the decree of the lower court).

The Circuit Court of Appeals had power to adopt that rule; (Judicial Code, Sec. 122; 26 Stats. at L. 826; Sec. 1114, Comp. Stats. U. S. 1913).

(a) THIS BEING A SUIT IN ADMIRALTY, *THE RATE OF INTEREST* ON THE SUM AWARDED BY THE DECREE OF THE DISTRICT COURT WAS DETERMINABLE *AT THE DISCRETION* OF THE CIRCUIT COURT OF APPEALS, AS WAS ALSO THE DETERMINATION OF THE QUESTION WHETHER OR NOT ANY INTEREST SHOULD BE AWARDED.

Hemmenway, Claimant of Ship Independence vs. Fisher, 20 How. (61 U. S.) 255, 15 L. ed. 799, 800;

The Scotland, 118 U. S. 507, 519;

The Maggie J. Smith, 123 U. S. 349, 356;

The Albert Dumois, 177 U. S. 240, 255;

The Blenheim, 18 Fed. 47, 48 (the opinion reviews the decisions);

The Express, 59 Fed. 476 (C. C. A., 2nd Ct.);

The North Star, 62 Fed. 71, 87 (opinion by Circuit Judge Taft);

Union Steamboat Co. vs. Chaffin, 204 Fed. 412, 419, 420 (C. C. A., 7th Ct.);

The Argo, 210 Fed. 872, 875 (C. C. A., 9th Ct.).

(b) THE CIRCUIT COURT OF APPEALS HAD POWER TO CORRECT THE MANIFEST ERROR OF LAW APPARENT UPON THE FACE OF THE RECORD IN THIS CASE.

(1) In this case there was a "plain error not assigned" which "the Court, at its option, may notice," under Rule 24, subdivision 4 (Rules, C. C. A., 9th Ct.).

The libel prayed for the wages actually earned, and (Tr. Rec., pp. 4, 5) "a sum equal to one day's pay for each and every day during which payment of said wages and victualling money has been delayed beyond the evening of the first day of October, in the year aforesaid, to wit, the sum of eighty-two and $^{27}/_{100}$ ($82.27) dollars, AND A SUM EQUAL TO ONE DAY'S PAY FOR EACH AND EVERY DAY DURING WHICH PAYMENT OF SAID WAGES AND VICTUALLING MONEY SHALL BE DELAYED BEYOND THE DATE OF THE FILING OF THIS LIBEL . . . and that the libelant may have such other and further relief in the premises, as in law and justice he may be entitled to receive."

The opinion delivered by the District Court states (Tr.

Rec., p. 35): "A decree will, therefore, be entered for libelant as prayed for."

The *postea* of the decree of the District Court recites (Tr. Rec., p. 36): "That all the allegations of the libel herein are true. . . . And the Court having further ordered that a decree be made and entered herein in favor of libelant *AS PRAYED FOR IN SAID LIBEL.*"

The adjudicating part of the decree awarded a certain sum ($151.59), which was the amount of wages due as prayed for under the provisions of Section 4529, R. S., AT THE TIME OF THE ENTRY OF THE DECREE, but does not conform to the statutory requirement (Section 4529, R. S.) that wages shall continue accruing after the entry of the decree until the wages actually earned shall have been paid.

The adjudicating part of a decree is a mere conclusion of law drawn from the recitals of the *postea*, and a court is bound to draft it in such form that it will give effect to all the statutory provisions.

(2) "An appeal in admiralty from a District Court to the Circuit Court of Appeals opens the whole case for trial *de novo* in the appellate court subject to its rules, and the fact that one party did not appeal does not preclude the court from directing the entry by the District Court of a decree more favorable to him" on a question of fact.

The above quotation is the syllabus of the opinion in

Munson S. S. Line vs. Miramar S. S. Co., 167 Fed. 960 (C. C. A., 2nd Ct., 1909), which is the leading case holding that the appellate jurisdiction of the Circuit Courts of Appeals in admiralty cases is the same as that of the Supreme Court of the United States on appeals from the old Circuit Courts between the years 1803 and 1875.

The above decision involved a question of fact. *A fortiori,* the plain error of law apparent on the face of the record in this case could be corrected.

Mr. Justice Harlan delivered the opinion in Gilchrist vs. Chicago Insurance Co., 104 Fed. 566, 570, 571 (C. C. A., 7th Ct., 1899), which is the leading case holding that the appellate jurisdiction of the Circuit Courts of Appeals in admiralty cases is the same as that of the old Circuit Courts on appeals from the District Courts.

The Gilchrist decision was followed in:

Chicago Ins. Co. vs. Graham Transp. Co., 108 Fed. 271, 273 (C. C. A., 7th Ct., 1901); and in

The Nyack, 199 Fed. 383, 388, 389 (C. C. A., 7th Ct. 1912).

See, also:

Irvine vs. The Hesper, 122 U. S. 256, 30 L. ed. 1175;

C. C. A., Second Circuit:

Pettie vs. Boston Towboat Co., 49 Fed. 464, 468;
The Umbria, 59 Fed. 489, 490;
The Western States, 159 Fed. 354, 360;

Reid vs. Fargo, 213 Fed. 771, 773;
The Minnie, 225 Fed. 36, 38 (decided in 1915).

C. C. A., Fourth Circuit:
Henderson vs. Kanawha Dock Co., 185 Fed. 781, 783 (dictum).

C. C. A., Sixth Circuit:
City of Cleveland vs. Chisholm, 90 Fed. 431 (opinion by Circuit Judge Lurton).

C. C. A., Ninth Circuit:
The State of California, 49 Fed. 172, 175 (Dist. Ct.);
The Sirius, 54 Fed. 188, 194;
Nelson vs. White, 83 Fed. 215, 217, 218;
The San Rafael, 141 Fed. 270, 275;
The Tokai Maru, 190 Fed. 450 (458).

For the history of legislation regarding appellate jurisdiction in the admiralty, see Dower vs. Richards, 151 U. S. 658, 663-664.

(a) THE HOUSE OF LORDS OF ENGLAND HAS DECIDED THAT UNDER THE ENGLISH MERCHANT SHIPPING ACT (WHICH PROVIDES THAT A SEAMAN'S WAGES SHALL CONTINUE UNTIL "FINAL SETTLEMENT," WHICH IS OBVIOUSLY FOR A LESS PERIOD THAN UNTIL "ACTUAL PAYMENT" AS PROVIDED BY SECTION 4529, R. S.), A SEAMAN'S WAGES, IN THE EVENT OF NON-PAYMENT WHEN DUE, SHALL CONTINUE UNTIL THE DATE OF THE ENTRY OF THE DECREE IN THE APPELLATE COURT.

Palace Shipping Co. vs. Caine, 10 Asp. M. C., N. S. 529; 76 L. J., K. B., 1079; A. C. 386; 97 L. T. 587; 13

Com. Cas. 51; 23 T. L. R. 731; decided July 29, 1907; opinions delivered by Lord Chancellor Loreburn, and Lords Macnaghten, James of Hereford, Robertson, and Atkinson.

The Court of Appeals report of the above case is:

Caine vs. Palace Shipping Co., 10 Asp. M. C., N. S., 380, 385; 76 L. J., K. B. 292; (1907) 1 K. B. 670.

See also Re The Great Eastern S. S. Co., 5 Asp. Rep. M. C., N. S. 511, at page 515; 53 L. T. 594.

(b) The respondent could not have appealed from the decree of the District Court, because it granted him all wages due at the date of its entry, and because he would thereby have waived all right to damages, or interest in the nature of damages, because of the delay.

The Express, 59 Fed. 476 (C. C. A., 2nd Ct.).

CONCLUSION.

The respondent respectfully submits that the decree entered in this case on May 18, 1914, by the United States Circuit Court of Appeals for the Ninth Circuit was correct in all respects at the time of its entry, but that as the Act of March 4, 1915, entitled, "An Act to Promote the Welfare of American Seamen," etc. (38 Stats. at L., p. 1164, c. 153, sec. 3), increased the measure of damages under the provisions of Section 4529, R. S., from "one day's pay" to "a sum equal to *TWO DAYS' PAY* for each and every day during which payment is delayed beyond the respective

periods," and as that Act became effective on November 4, 1915, and as the hearing in this Court on certiorari in suits in admiralty is *de novo*, (or, as this Court may, at its discretion, award interest at *any rate* under its Rule 23, sub. 4,) THIS COURT SHOULD DIRECT THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA TO ENTER A DECREE FOR THE RESPONDENT HEREIN (LIBELANT IN THE DISTRICT COURT), AWARDING HIM ALL THE RELIEF PROVIDED BY THE DECREE OF THE CIRCUIT COURT OF APPEALS PRIOR TO NOVEMBER 4, 1915, AND AWARDING FROM NOVEMBER 4, 1915, TO THE TIME OF THE ACTUAL PAYMENT TO HIM OF HIS WAGES, "A SUM EQUAL TO *TWO* DAYS' PAY FOR EACH AND EVERY DAY."

Respectfully submitted,

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JOHN L. McNAB,
Proctors and Advocates for Respondent.